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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 677

GREAT COASTAL EXPRESS, INCORPORATED, AND PRICE TRANSFER COMPANY, INC., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This case involves the application, pursuant to Section 5(2)(a) of the Interstate Commerce Act (49 U.S.C. 5(2)(a)), of Great Coastal Express, Incorporated ("Great Coastal"), to purchase the motor carrier

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operating rights of Price Transfer Company, Inc. ("Price"). The Commission denied Great Coastal's application, and the denial was affirmed by a three-judge district court.

Price's interstate operating certificate authorized it to service the Virginia cities of Newport News and Norfolk (J.S. 2a, 9a). Great Coastal holds motor carrier operating certificates for the transportation of general commodities between New York City and intermediate locations on the one hand and several points in Virginia on the other (J.S. 2a, 8a). However, Great Coastal's authorization does not permit it to enter the Norfolk-Newport News commercial area (J.S. 8a).

In April 1962, Great Coastal and Price began to interchange commodity shipments destined to the Norfolk area (J.S. 11a–15a). Great Coastal carried the freight to a point near Newport News, and Price completed the haul into Newport News and Norfolk (J.S. 12a). Subsequently, Great Coastal agreed to buy Price's operating rights and, in January 1963, it submitted its purchase application to the Commission (J.S. 7, 6a). The Commission granted Great Coastal's request for authority to lease Price's rights pending disposition of the application. Under this temporary authority, Great Coastal provided, for the first time, single-line service from New York to the Norfolk-Newport News area (J.S. 3a, 40a).

The Commission examiner, after a full hearing, determined that the combination of Great Coastal's rights with Price's operating rights would result in a

service substantially different from that which had previously been performed under the separately operated certificates. He found that Great Coastal and Price had not participated in substantial traffic movements to Norfolk after their 1962 agreement and that, consequently, approval of the application would result in an additional competing service rather than in a substitution or improvement of existing services (J.S. 38a–40a). The examiner also found (1) that existing carriers are providing adequate single or connecting-line service to shippers in the Norfolk area (J.S. 43a); (2) that any substantial loss of traffic would adversely affect the efficiency of their existing services to the public's detriment (J.S. 43a); and (3) that extending Great Coastal's operations would "disrupt the competitive balance with harmful effect on competing carriers and would not foster sound economic conditions in the industry" (J.S. 43a). He concluded that any public benefits which might accrue from the transfer were outweighed by the unfavorable impact upon carriers currently authorized to provide service to the Norfolk area (J.S. 43a). Upon consideration of the record and the examiner's report, the Commission agreed that the application should be denied (J.S. 45a–46a). The district court sustained the Commission's findings and conclusions (J.S. 2a–4a, 243 F. Supp. 943).

ARGUMENT

The decision below is correct and presents no question warranting plenary review by this Court. The Commission's overall governing standard turns on whether the combination of two distinct operating au-

thorities would substantially change the prior pattern of service so as adversely to affect the operations of existing carriers. *Shein* v. *United States,* 102 F. Supp. 320, 326 (D.N.J.), affirmed, 343 U.S. 944; *Falwell* v. *United States,* 69 F. Supp. 71, 76 (W.D. Va.), affirmed, 330 U.S. 807. In making that determination, the Commission customarily reviews the seller's volume of shipments prior to submission of the application for purchase. If it finds that the service was not dormant, it determines whether or not the acquisition would benefit the public. *Houff Tansfer, Inc.* v. *United States,* 105 F. Supp. 851 (W.D. Va.); *Bowman Transportation, Inc.—Control and Merger,* 93 M.C.C. 133; *Pacific Intermountain Express Co.—Control and Purchase,* 57 M.C.C. 467. The Commission here agreed that Price's certificate was not dormant. It also found, however, that the volume and nature of Price's recent service reflected a very limited use of its operating rights (J.S. 38a–39a), and that even after it had begun to interchange shipments with Price, Great Coastal had not participated to any appreciable extent in traffic moving between its authorized points and the Norfolk area (J.S. 40a). Accordingly, the Commission determined that approval of the application would, by greatly expanding the existing use, result in a substantially new competitive service. This conclusion was not inconsistent with prior Commission decisions. The cases cited by appellants (J.S. 11f) demonstrate that dormancy for the six-month period prior to the application is a factor militating against approval of an application; they

do not establish the converse—*i.e.*, that evidence of use entitles the applicant to consummate the proposed acquisition. Where, as here, the nature and quality of anticipated use is likely to differ substantially from existing use, it is appropriate for the Commission to consider the application in light of this change.

The court below found that there was also sufficient basis for the Commission's appraisal that the public interest would be adversely affected by the authorization of an additional motor carrier service to the Norfolk area. It correctly observed that such a determination should not be upset unless it is without evidentiary support or is unsound in law. *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, 126.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

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